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Michael G. Heyman
John Marshall Law School

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ESSAYS

DISCRETIONARY ADJUDICATORY RULEMAKING: DUE PROCESS OF LAWMAKING AND IMMIGRATION LAW

MICHAEL G. HEYMAN*

I. INTRODUCTION

Immigration law has long eluded the norms of American public law. Whether called a “maverick” or “wild card” of American law¹ or “just plain different,”² its distinctiveness may be unparalleled in our law. These differences are often discussed in the context of constitutional doctrine,³ but surely are not confined to it. Rather, in many respects, immigration law has developed with an apparent indifference toward conventional legal norms.

Several years ago, in the article *Judicial Review of Discretionary Immigration Decisionmaking*, I discussed this in the context of the exceptional deference often afforded decisions from the immigration system.⁴ That article noted the convergence of several factors, including plenary power, as possible explanations for this deference.⁵ Little has changed since then. The judiciary still grants exceptional deference to the largely discretionary decisions of the immigration system.⁶ However, the problems with discretion

* B.A., Temple University; M.A., The University of Wisconsin; J.D., The National Law Center, The George Washington University; LL.M., New York University School of Law.

1. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

2. Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CON. L.Q. 925 (1995).

3. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (providing an extensive, probing discussion of the manner in which some judges have sought to avoid the hardships wrought by the plenary power doctrine).

4. Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861 (1994). I use the term “immigration system” chiefly as shorthand for decisions by immigration judges and the Board of Immigration Appeals. It should be noted, though, that both fall under the aegis of the Executive Office of Immigration Review and not the INS.

5. *Id.* at 862.

6. See Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, Address before the Immigration Law Conference, Boulder, Colorado (May 31, 1996)

are not limited to deciding how to cabin and review discretionary calls, but go deeper, revealing more fundamental defects in the administration of our immigration laws. Not only do we have a problem with judicial review of particular exercises of discretion, but the rulemaking process itself seems infected by discretionary excess.

Strangely, this problem with rulemaking is revealed through the vehicle of a seemingly insignificant case which the Supreme Court has decided to hear, *Elramly v. Immigration and Naturalization Service*.⁷ However, as insignificant as this case may be, it is remarkable in the sense that it resulted from a rule produced by the Board of Immigration Appeals (BIA) eighteen years ago. In *In re Marin*, the BIA created an adjudicatory rule which effectively denies relief from deportation to all aliens convicted of "serious drug offenses."⁸ Moreover, virtually *any* drug offense qualifies as serious, given the broad interpretation assigned to the term "trafficking."⁹

The problem with the creation of this adjudicatory rule is that the BIA simply had no authority to take such action. By doing so, it usurped Congressional authority. It happened because the relevant provision of the Immigration and Nationality Act (INA)¹⁰ empowers the Attorney General and her representatives to waive deportability at her discretion, provided that the alien has satisfied the statutory eligibility requirements.¹¹ Given the conversation-stopping nature of the word discretion, it is understandable that before *Marin* no one had considered closely the distinction between exercising good judgment in making waiver decisions and constricting that category of aliens who are eligible for that waiver in the first place. The presence of the word discretion may give the impression that the BIA has the authority to

(forthcoming 1997) (manuscript on file with the author)(examining the problems of discretion in immigration law).

7. 73 F.3d 220 (9th Cir. 1995) *cert. granted*, 116 S.Ct. 1260 (U.S. Mar. 18, 1996). I describe the case as insignificant not because of any callousness toward respondent, but the issues presented make it unclear why the Court granted certiorari at all. Simply put, Mr. Elramly seems like a very petty criminal, having served 60 days for a minor drug violation, who was denied relief from deportation because of a stringent rule regarding drug offenses.

8. 16 I. & N. Dec. 581, 586 n.4 (B.I.A. 1978).

9. Decisions of the BIA indicate that "drug trafficking" encompasses "any felony punishable under" the Controlled Substances Act, the Controlled Import and Export Act, or the Maritime Drug Enforcement Act where the maximum term of imprisonment authorized exceeds one year. *In re L.G.*, File No. A26 025 339, 1995 WL 582051 (B.I.A. 1995).

10. Immigration and Nationality Act, Pub. L. No. 82-412, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter INA].

11. INA § 212(c), 8 U.S.C. § 1182(c) (1994). At the time *Elramly* was decided by the Board, this section of the INA provided that:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Id.

make this higher order decision on eligibility in its administration of our immigration laws. It does not.

II. THE BIA AND DISCRETION

The BIA was created in 1940 by the Attorney General, and has no statutory basis.¹² By itself, this does not impugn the Board, but may cast doubt on the usefulness of making broad, formalistic generalizations of what may or may not be done by administrative agencies. The term "agency" has simply become too diffuse to carry any fixed meaning.¹³ Nevertheless, the fact remains that what the Attorney General may do, so may the Board. In principle, the Board's discretionary authority is as great as that of the Attorney General.¹⁴ Although the regulations prescribe that Board members shall "perform the quasi-judicial function of adjudicating cases coming before [them],"¹⁵ it can also "exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case[s]."¹⁶

My previous piece on discretion focused on problems with the judicial review of discrete, discretionary decisions. I expressly reserved comment on how to deal with policymaking.¹⁷ Here, we have an instance of policy created through adjudication, thus triggering a number of general rules from administrative law.

Unquestionably, the rulemaking function can address problems of general application, filling in any gaps left by enabling statutes.¹⁸ The legislative process cannot always reasonably foresee all potential problems. Rulemaking exists as a matter of practical necessity. In support of its position in *Elramly*, the INS has stressed the appropriateness of the BIA proceeding through rulemaking.¹⁹

12. See Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1307 (1986)(discussing the history of the BIA). See also *id.* at 1376 (analyzing the calls for statutory recognition and independence for the BIA).

13. See E. Donald Elliott, Jr., *The Dis-Integration of Administrative Law: A Comment on Shapiro*, 92 YALE L.J. 1523 (1983).

14. See *Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954) (stating that "[t]he scope of the Attorney General's discretion became the yardstick of the Board's. And if the word 'discretion' means anything in a statutory or administrative grant of power, it means the recipient must exercise his authority according to his own understanding and conscience.").

15. 8 C.F.R. § 3.1(a)(3) (West 1996).

16. See *id.* at § 3.1(d).

17. Heyman, *supra* note 4. That article concluded that it was anomalous that courts were most limited in their review function when agencies had used unlimited discretion. Indeed, it called for the use of agency standards to guide the use of discretion and thus promote effective judicial review. However, it expressly noted that "[w]e are not dealing with administrative policymaking, but with adjudication." *Id.* at 906-07.

18. See *id.* at 866-71(discussing the problems of the nondelegation doctrine and the current administrative state).

19. See Petitioner's Brief, *Immigration and Naturalization Serv. v. Elramly*, 1996 WL 263421, at *14-15 (U.S.Pet.Brief 1996) (No.95-939)[hereinafter Petitioner's Brief]. There the Solicitor General noted that the "Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing . . . the agency may rely on its rulemaking authority to determine issues that do not require

Elramly involved a permanent resident who pled guilty to two counts of selling hashish; worth one-hundred dollars in the aggregate.²⁰ Elramly had obtained permanent resident status in 1981, after marrying a U.S. citizen in 1979. Elramly had three children through that marriage, and then divorced in 1990. He remarried in 1991, after the beginning of deportation proceedings. In February of 1990, the INS charged Elramly with deportability based on his state-law drug-trafficking offense.²¹ Elramly conceded the conviction, thus rendering himself deportable.²² Under § 212 (c) of the INA, the BIA agreed with the Immigration Judge's decision that Elramly did not merit discretionary relief because of the seriousness of his drug conviction.²³

According to the INS, in its brief to the Supreme Court on this case, the BIA has simply created a general rule or presumption that aliens convicted of drug trafficking have a harder road to hoe than others seeking relief from deportation.²⁴ However, what has happened may belie the kinds of legal chestnuts of which black letter law is comprised. In this case, we do not have the formal rulemaking that requires notice and comment, but adjudicatory rulemaking, ostensibly in the exercise of the BIA's discretionary authority. Yet, if we're to follow conventional administrative law, apparently this action is legally tantamount to formal rulemaking. That is the government's argument here.²⁵ It denies any legal distinction between those rules created through the formal rulemaking process, and those produced through adjudication, characterizing the distinction as "irrelevant."²⁶

The government points take us through a number of formal propositions which, though possibly sound as general legal precepts, may not persuade in this situation. We are told that the Attorney General and the BIA are legally equivalent, and therefore all entities within an "agency" stand on the same legal footing so long as legal authority has been delegated. Beyond that, we're told because an agency may engage in rulemaking, a process which need not follow any particular formalities, the effect of the BIA's discretionary adjudication has the same force as if the Attorney General herself had

case-by-case considerations." *Id.* (quoting *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 228 (1991)).

20. Petitioner's Brief, 1996 WL 263421, at *5.

21. INA § 241 (a)(11), 8 U.S.C. § 1251 (a)(11)(1988).

22. Petitioner's Brief, 1996 WL 263421, at *6.

23. *Id.*

24. The government argued that "[i]nherent in [the BIA's] discretion is the authority of the [BIA] to establish general standards that govern the exercise of discretion, as long as these standards are rationally related to the statutory scheme." *Id.* at *9 (quoting *Ayala-Chavez v. INS*, 944 F.2d 638, 641 (9th Cir. 1991)).

25. In its reply brief, the government argued that the "open-ended discretion afforded the Attorney General" does not require particularized consideration of the equities in individual cases. Petitioner's Reply Brief, *Immigration and Naturalization Serv. v. Elramly*, 1996 WL 435317, at *3 n.1 (U.S. Reply Brief 1996) (No. 95-939).

26. "That the 'rule' in this case was established over the course of BIA adjudications, rather than through formal rulemaking, is irrelevant. Agency adjudication 'operates as an appropriate mechanism not only for fact finding, but also for the exercise of delegated lawmaking powers.'" (citation omitted.) Petitioner's Brief, *supra* note 18, at *15 n. 6.

acted through rulemaking. Perhaps some of this may be true, but we can only test this pyramid of propositions by looking at the case that began all of this some eighteen years ago.

III. *IN RE MARIN*²⁷

Marin involved an appeal from an Immigration Judge's denial of § 212(c) relief. Marin had pled guilty to selling cocaine, and was sentenced to an indeterminate sentence of one year to life. Though he served a total of thirty months, while he was confined he was served with an Order to Show Cause, charging him with deportability for his criminal conviction. From this order he sought, and was denied, § 212(c) relief. The Immigration Judge concluded that a grant would be inappropriate absent a showing of "unusual" or "outstanding" equities, a standard not met because of the recency and severity of Marin's conviction.

Marin appealed the finding, claiming that the judge had used the wrong standard. Apparently, the "unusual" or "outstanding" equities test had its origin in another sub-area of immigration law, adjustment of status. Indeed, the judge in *Marin* cited to an adjustment case,²⁸ apparently finding it analogous despite the difference in the relief sought.²⁹

Affirming this apparent misreliance on precedent, the Board in *Marin* first noted the general inadvisability of the cross-application of standards between different areas of relief from deportation.³⁰ However, it found no error here because the "general approach...of balancing favorable and unfavorable factors with the context of the relief sought...may be applied to any case involving the exercise of discretion."³¹ Now the Board is getting into trouble. It asserts that standards from different areas may be imported will, so long as both areas involve some sort of balancing test. All adjustment of status cases cannot be analogous to cases involving the deportation of long-term permanent residents. Longstanding permanent residents simply command more concern than do those with less of a stake in being here. But the Board's mistakes get worse.

Conceding that Marin had committed a recent and serious offense, the Board found the test applied appropriate, although the rest of the opinion set

27. 16 I. & N. Dec. 581 (B.I.A. 1978).

28. *In re Arai*, 13 I. & N. Dec. 494 (B.I.A. 1970).

29. In an adjustment case, a non-immigrant seeks permanent residence through a provision of the INA permitting this action to take place at an INS office, rather than requiring the alien to go through consular processing at home. 8 U.S.C. § 1255 (West 1996). By contrast, 212(c) is only applicable to permanent residents, and requires seven years of lawful domicile before it's even potentially available. 8 U.S.C. § 1182 (West 1996).

30. *See Marin*, 16 I. & N. Dec. at 586.

31. *Id.* (emphasis supplied). It should be noted that *Arai* itself conceded that applications for adjustment must be decided on an individual basis, and that where adverse factors appear "it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities." *See Arai*, 13 I. & N. Dec. at 496. At that, this was dicta, since the Board in *Arai* didn't require such a showing from him.

out the various factors that should ordinarily be weighed in the *individualized* use of discretion.³² In and of itself this may seem like nitpicking, for Marin had committed a serious offense and therefore this opinion, though sloppy, might seem harmless. But in the course of affirming the Immigration Judge, the Board established a general rule as a virtual afterthought.

Having found Marin a serious wrongdoer, the Board engaged in rulemaking through a footnote, thus setting the stage for the *Eramly* litigation. Reading the INA and case law as showing substantial disfavor for drug offenders, it concluded that "we require a showing of unusual or outstanding countervailing equities by applicants for discretionary relief who have been convicted of serious drug offenses, particularly those involving the trafficking or sale of drugs."³³ Without elaboration, the Board spoke to the future through the vehicle of a case that at once accented the necessity for individualized determinations and constructed a barrier of uncertain contours to those convicted of drug offenses.

As with much sloppy decisionmaking, the potential for future tribunals to misunderstand *Marin* was great. And surely it has happened. But, perhaps more remarkably, the BIA itself has struggled with its intent in *Marin*. For example, aside from the oddity of the word "unusual,"³⁴ it is unclear just what would happen were an alien to pass the *Marin* test, regardless of what the test really means.

In *In re Buscemi*³⁵ the Board attempted to explain that meeting this test does not lead to an immediate grant, but only serves as a precondition for full consideration of the waiver application.³⁶ This is odd. Because the drug offense triggers the more stringent test for a favorable exercise of discretion, it should be apparent that a showing of unusual or outstanding favorable equities would negate that factor, thus leading to a favorable decision.

Indeed, in *In re Edwards*,³⁷ the Board wrangled over just this question by acknowledging that *Marin* has "caused misperceptions in some quarters."³⁸ The Board is included among those quarters. For in *Edwards* we have a sharply divided Board evincing just such misperceptions in a case which includes several separate opinions, each reflecting a different view of the

32. "Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." See *Marin*, 16 I. & N. Dec. at 584.

33. *Id.* at 586, n.4.

34. That is, it is not clear whether such term suggests that the equity must be statistically rare, or that it must be particularly strong. If it is the second, that problem would seem to be covered by the word "outstanding."

35. 19 I. & N. Dec. 628 (B.I.A. 1988).

36. "Finally, we observe that an alien who demonstrates unusual or outstanding equities, as required, merely satisfies the threshold test for having a favorable exercise of discretion considered in his case; such a showing does not compel that discretion be exercised in his favor." *Id.* at 634.

37. File No. A-18274740, Deportation Proceedings, 1990 WL 385757 (B.I.A. 1990).

38. *Id.* (J. Morris, concurring).

Marin test. What is clear however, is that whatever *Marin* means, it has become a *de facto* bar to relief, a result seemingly at odds with the very notion of discretion.

For example, in a recent case in the Sixth Circuit, a panel of that court asked the INS to provide it with decisions in which relief had been granted. As the court noted, “[a]lthough more than three thousand of BIA’s decisions have been published, the INS has provided the panel with only a single decision”³⁹ in which relief had been granted. This left the court with the impression that the Board had a policy of simply not granting relief, thus having engaged in the “unauthorized assumption by the INS of a position properly to be made by the Congress.”⁴⁰

Remarkably, rather than denying this status as a *de facto* bar, the government in *Elsramly* wholeheartedly endorses it. By its view, “[t]he necessity of engaging in ad hoc, case-by-case analyses would significantly hamper the BIA’s ability to promote a uniform interpretation and application of the law.”⁴¹

This view represents two extraordinary positions. First, the government effectively argues against discretion itself, preferring a rule of unyielding exclusion to one of particularized determinations.

Second, it argues against a more nuanced approach because such an approach will result in more grants of relief. Assuming that discretion is applied on a highly individual basis, the government balks at this more nuanced approach because more people will be found worthy of retention. Thus, we should endorse a uniform view *even though* its application will inevitably prevent the retention of precisely those for whom discretion should be exercised sensitively in the first place. Obviously, this view seriously distorts what is meant by discretion and resists the very ameliorative purposes for which discretion exists in this area anyway: the retention of those whose reasons for remaining here outweigh the wrongs they have committed.

IV. MISGUIDED DISCRETION TALK

Previously, I called for the creation of standards to guide the use of discretion,⁴² and at least superficially, seem to be contradicting myself here. Moreover, the Board appears to have done what agencies, especially in the post-*Chevron*⁴³ world can do. The Board has filled in the open texture of its enabling statutes without fear of judicial intervention. That earlier piece examined the difficulties with the word discretion, noting the variety of meanings, perhaps conflicting, it seems to bear. Though discretion probably

39. *De Gonzalez v. Immigration and Naturalization Serv.*, 996 F.2d 804, 810 (6th Cir. 1993).

40. *Id.* at 810.

41. Petitioner’s Brief, *supra* note 18, at *12.

42. Heyman, *supra* note 4, at 906-07.

43. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

exists to assure individualized decisionmaking, the presence of discretion, at least in immigration law, has led to a stunted judicial review. The Administrative Procedure Act⁴⁴ provides for judicial review from an abuse of discretion, but that would seem to lead us in circles in the absence of standards for determining abuse. The very presence of discretion often reflects the failure of Congress to generate those standards through legislation.

Fortunately the dilemma of determining what standards Congress intended to implement does not exist here. Taken as a whole, the INA can be seen as an embodiment of Congressional intent in this area. The Board in *Marin* did two very different things. In creating factors that should be considered by Immigration Judges in applying § 212(c), it created precisely the standards so necessary to guide primary adjudicators, such as Immigration Judges. However, by erecting a higher standard for drug offenders, it exceeded its authority. Myriad invocations of its rulemaking authority cannot obscure this.

A problem with ordinary, decisionmaking discretion is that it is so variable, so dependent upon the beliefs and values of the judges before whom applicants for relief come.⁴⁵ *Marin* sought, in part at least, to guide judges in that respect. But the creation of a sub-group of § 212(c) applicants is a very different matter.

The INA contains a number of forms of relief from deportation, each dealing with a different group of deportable aliens. And, specific requirements must be met for each form of relief.⁴⁶ Of these, § 212(c) is perhaps most forgiving, for it deals with long-term residents of this country. Thus, it carefully delineates the forgivable offenses and, importantly, rules out those who've committed aggravated felonies for which they have served at least five years of imprisonment. Taken as a whole, the INA is the embodiment of Congressional values in this area. It set the eligibility requirements for § 212(c) relief: discretion begins where eligibility ends.

Surely there is an inexact line between rulemaking and legislation, but this case squarely falls on the legislative side of that line. Were it clear that American society condemns all drug offenders equally, perhaps the Board's action could be seen as an implementation of that shared belief. But the use of one-hundred dollars of hashish with another seems far different from, for example, a large scale sale of cocaine. Thus, by effectively constricting that

44. 5 U.S.C. § 706 (1996).

45. Writing on the problems of discretion, Professor Carl Schneider defended its presence in American law, noting that "decisionmakers' discretion is constrained by their socialization and training." CARL E. SCHNEIDER, DISCRETION AND RULES: A LAWYER'S VIEW, IN THE USES OF DISCRETION 47, 81 (Keith Hawkins ed. 1992). Though that may sometimes be true of the decisions of Immigration Judges when applying the standards of § 212(c), it is arguably irrelevant to the BIA in this context of rulemaking.

46. Indeed, the Court has noted that provisions of statutes "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co., Inc.* 115 S.Ct. 1061, 1067 (1995). Certainly this is true of the INA.

group of people for whom this relief is available, the Board has not exercised any discretion it possesses, but has exceeded its statutory authority. Only the most tortured application of abstract precepts about rulemaking can possibly justify this kind of conduct.

V. RULEMAKING AND LEGAL PROCESS

The government in *Eramly* stressed the irrelevance of distinguishing between adjudicatory rulemaking and its formal counterpart, characterizing adjudication as an “exercise of delegated lawmaking powers.”⁴⁷ Although that distinction may count for little in some cases, the distinction is important here. Formal rulemaking requires an agency to act with a comprehensiveness, discipline and accountability quite obviously missing in this case.

Were the Attorney General to have engaged in rulemaking on the issue of whether convictions for drug offenses are a *de facto* bar to discretionary relief, she would have been forced to consider the effect of such a rule on an entire class of aliens. She would thus be forced to recognize the differences within the group. But, because of the retrospective, fact-driven nature of adjudication, the Board focused more on the merits of the individual case than on the desirability of creating broad-based policy.⁴⁸ And, it should be recognized that *Marin* represented the affirmance of an Immigration Judge who had applied the wrong standard to a § 212(c) case.

The rulemaking process requires an agency to act with “a discipline consistent with predictable, consistent, and impartial agency action.”⁴⁹ Rather than responding, perhaps reflexively, to a particular situation, rulemaking constrains agency power, forcing agencies to adhere more closely to traditional rule of law values. “As agency flexibility and power is thus enhanced by ad hoc lawmaking, so may accountability be diminished. An agency may hide the ball among its various opinions and spread responsibility over the range of officials that produce adjudications.”⁵⁰ This is precisely what happened in *Marin*. The Board produced what became an inexorable rule of denial by affirming an Immigration Judge’s novel application of law through a footnote. Accountability and discipline were clearly at their low ebb.

The case that *Marin* and its progeny reflect conventional, hornbook law is hardly made. The process was infected by a decision made by the wrong entity, in the wrong manner and in the wrong area—an area laden with critical and controversial value judgments best left to politically accountable

47. Petitioner’s Brief, *supra* note 18, at *15, n.6.

48. As the hornbook authors wrote, “[b]ecause of its different set of procedures—designed for an intensive and retrospective examination of the conduct of accused individuals—adjudication is generally too cumbersome to do a good job of rulemaking.” ALFRED C. AMAN, JR. AND WILLIAM T. MAYTON, ADMINISTRATIVE LAW 102-03 (1993).

49. *Id.* at 105.

50. *Id.* at 106.

decisionmakers. Quite simply, the due process expected in law creation itself is absent,⁵¹ and what happened harkens back to the ongoing debate about the nondelegation doctrine.⁵²

Elramly requires careful consideration of the process variables of law making. Not only must we look to the process employed, but also to the very entity which made this choice, the BIA.⁵³ Early in his tenure on the Court, Justice Stevens made some intriguing suggestions along these lines in *Hampton v. Mow Sun Wong*.⁵⁴

In *Hampton*, respondents challenged a Civil Service Commission rule barring non-citizens from employment in the federal civil service. The case could have been decided on traditional equal protection grounds, but Stevens took a different tack.⁵⁵ Noting that the commission "has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies,"⁵⁶ he concluded that its interests were limited to simple questions of personnel administration. Whether or not to create a *de facto* bar to employment by non-citizens was not the type of legal question that the commission could address.

Stevens concluded that because these aliens had been admitted as a result of decisions made by Congress and the President "due process requires that the decision to impose that deprivation of an important liberty be made . . . at a comparable level of government."⁵⁷ *Marin* is similar. There was a complex, politically sensitive value choice made by the Board, a quasi-judicial entity with no statutory pedigree. And, that choice affected the very ability of

51. For a general discussion of what may be termed "due process of lawmaking," see Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975), in which Professor Tribe talks of the importance that some decisions be made by entities possessing the requisite democratic legitimacy. Thus, rather than simply focusing on the substantive content of policies or on the procedural devices through which they are enforced, Tribe focused on the structures themselves through which policies are formed and applied. *Id.*

52. For years, Chief Justice Rehnquist has urged the revival of the nondelegation doctrine. For example, in *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980), he stated some classic arguments against delegation:

As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Id. at 685-86 (Rehnquist, C.J., concurring)(citations omitted).

53. Thus, even though formal rulemaking would have been preferable to adjudication, perhaps it too is inappropriate here.

54. 426 U.S. 88 (1976).

55. Indeed, this is one of Stevens' first decisions, and it has been suggested that the four other justices in the majority joined him for that reason. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 402 (1979).

56. See *Hampton v. Mow Sun Wong*, 426 U.S. at 114.

57. *Id.* at 116.

Marin to remain in a country to which he had immigrated, one which was his home. The same is true for Elramly.

Marin teaches two lessons which ultimately dovetail, one structural the other value laden. First, Congress is particularly well-suited to make this kind of decision because of its ability to enter into extended dialogue on the issues. It can hold hearings, hear experts and examine closely the implications of a proposed amendment, hopefully harmonizing it with the general statute in question, here the INA.⁵⁸ Congress has the competence and resources to make this decision. In this case, the Board does not.

But the structural benefit goes beyond mere mechanical competence. Regardless of what view we take of representative government,⁵⁹ legislators are clearly politically accountable. Presumably they mirror the wishes of their constituents. Therefore, the choices *they* make about policy issues reflect public sentiment, rather than the views of a few, isolated administrative law judges. If they do not, then they can and do hear from their constituencies.

Marin was ultimately a case about public values. In that seminal footnote establishing the *Marin* rule, the Board cited to several sections of the INA and two cases, presumably reflecting the view that our immigration law disfavors drug offenders even more than it does other criminals,⁶⁰ and applied this sentiment to all drug traffickers. But surely this is the wrong medium and forum for so important a decision on public values. The Board correctly recognized that this is a issue of public values, but improperly joined the issue.

Just as the Civil Service Commission was not competent to create a *de facto* bar to employment for non-citizens in *Hampton*, so too was the Board incompetent to create a *de facto* bar to discretionary relief. Discourse on public values is best conducted in Congress, for it has the competence and

58. Professor Eskridge has stressed the importance of achieving what he calls "horizontal coherence" in the law:

In my opinion, our aspiration for coherence in the law should concentrate more on the horizontal coherence of current policies, and less on the vertical coherence of a single policy backwards in time. Congress itself is the most legitimate institution for achieving greater horizontal coherence. But given the structural inertia and biases of the legislature, it is those who interpret and implement statutes—agencies, the executive, courts—that have the primary burden of fostering horizontal coherence.

William N. Eskridge, Jr., *Symposium: Peterson v. McLean: Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 123 (1988).

Despite Eskridge's concession to inertia, Congress has been very active in the immigration area, and has indeed set policy here.

59. That is, we've had considerable discussion of models of representative government recently, examining such models as the trustee theory, the agency theory, and the descriptive theories of representational structures. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 123 (2d ed. 1995).

60. *Matter of Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978). "Clear distinctions arise in the Act in the treatment of aliens convicted of drug offenses and those convicted of others crimes." *Id.* at 586 n.4.

legitimacy to decide such issues.⁶¹ It serves as the “theater of debate about which principles the community should adopt as a system, which view it should take of justice, fairness, and due process.”⁶²

VI. CONCLUSION

Elramly is not a *Chevron* case, for we are not dealing with a permissible interpretation of an ambiguous statute here; the Board quite obviously made new law, exercising discretion it plainly lacked. Yet *Marin* is history, and its strange process is only now brought to light because of *Elramly*. This case is about the proper “theater of debate” about public policy issues, focusing our concern on the process through which major institutional decisions are made.

Some years ago, Professor Aleinikoff explained the basis for his revulsion at the notion that aliens, at least those seeking entry, cannot look to the Constitution for extra-statutory relief.⁶³ Exploring the relationship between aliens and due process, he concluded that “what we ‘owe’ persons in terms of process is better understood as a function of what we are taking from them (community ties) than our relationship to them (membership in a national community).”⁶⁴

The *Marin* test effectively denies recognition of those ties. It shunts them aside, presumably on the basis that all drug traffickers have virtually forfeited their right to remain here. But due process is not a fixed, static notion. This case represents a classic violation of Tribe’s notion of structural due process and lawmaking. Our concern is not simply with the decision reached by the Board, but with the very fact that it acted in this arena at all.

Earlier, I mentioned the government’s suspect pyramid of propositions about administrative law, one it submitted controlled this case. It does not and cannot. All entities within an agency are not the same in terms of competence and accountability. Adjudicatory rulemaking is not invariably the legal equivalent of its formal counterpart. A handful of administrative law

61. Writing on public values in statutory interpretation, Professor Eskridge said that:

[S]tatutes are more than a series of ad hoc deals. . . [but] embody some overall policy rationality. Policy rationality suggests three related propositions: (1) different provisions of the same statute fit together in a coherent way and embody a reasonable public policy; (2) the statute is consistent with other statutes, so that the different statutes fit together coherently; and (3) the statute develops coherently over time.

William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1036 (1989).

62. RONALD DWORIN, *LAW’S EMPIRE* 211 (1986). There, Dworkin was comparing the rather sterile notion of the rulebook community with that of the community of principle, one he characterized as a “genuine associative community” of moral legitimacy. *Id.* at 214.

63. Commenting on the rights of those seeking entry to the United States, the Court said that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

64. T. Alexander Aleinikoff, *Aliens, Due Process and ‘Community Ties’: A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983). Indeed, in *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), the Court expressly recognized that an alien’s interest in living and working in this land of freedom is a weighty one, thus requiring Constitutional recognition.

judges should not be permitted to forge policy on so tenuous a footing as exists here. The stakes are simply too high to countenance this process.

Immigration issues have long divided this country, and Congress has been very active in this area of late.⁶⁵ These issues are both technically complex and profoundly political, going to the very notions of how we conduct ourselves as a polity. Regardless of our political jaundice, Congress is clearly the theater in which the debate must be joined and resolved.

For immigration law to fare better in the administrative state, we must set aside formalism, and take a functional look at the process of law creation. My earlier piece criticized the broad, elusive, almost ineffable nature of discretion in the decisional process. Now, we encounter yet another excess of discretion: adjudicatory rulemaking. The dangers here may be even greater, for as the Board takes on the role of a quasi-legislature, it does not merely seal the fate of individual applicants but forecloses relief for entire categories of people. That conduct must be recognized and repudiated.

VII. EPILOGUE

On September 16, 1996, the Supreme Court vacated the Ninth Circuit's judgment in *Elramly*, remanding the case for consideration in view of the recently enacted Antiterrorism Act.⁶⁶ That statute contains a section effectively denying § 212(c) relief to those convicted of crimes.⁶⁷ Thus, unless the Ninth Circuit refuses to apply the AEDPA retroactively, *Elramly*'s quest for relief has ended.

However, despite what we may think about the Court's remand and regardless of what we may think of recently passed immigration legislation, Congress is the correct institution to have made this kind of decision on the conditions for retention of deportable aliens in the United States. But that is not enough, for it only addresses the disposition of this case. Beyond that, the problems raised in this Essay still persist. Though the Court has not taken the lead in addressing them, they must be addressed if we're to bring immigration law out of the shadows and into the mainstream of American law.

65. For example, it recently passed the controversial Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA). In addition, scarcely five months after President Clinton signed the AEDPA, he signed the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA).

66. *Id.* The remand is reported in Wire Dispatches and Staff Reports, *Court Backs Out of Deportation Case*, Wash. Times Sept. 17, 1996 at A6.

67. The AEDPA, *supra* note 65, amends § 212(c) at § 440(d), denying the availability of relief to any "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." Beyond that, the recently enacted Illegal Immigration Reform and Immigration Responsibility Act of 1996 denies relief to those convicted of aggravated felonies. IIRIRA, *supra* note 65, at § 304.

